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Supreme Court, U.S.
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No. 99-663

IN THE

Supreme Court of the United States

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Petitioner,

v.

JOSEPH P. NIGRO, TRUSTEE FOR THE ESTATE OF
TRI-STATE CLINICAL LABORATORIES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Where a Debtor commits a crime during the pendency of a Chapter 11 bankruptcy, is the actual amount of the resulting criminal penalty assessed against the Debtor properly classified and prioritized as an administrative expense under the Bankruptcy Code?

LIST OF PARTIES

Respondent defers to Petitioner's presentation of the Parties to this action as stated in Petitioner's brief.

STATEMENT PURSUANT TO RULE 29.6

At the time the Debtor, Tri-State Clinical Laboratories, Inc., filed its bankruptcy petition, and throughout the entirety of this case, no parent corporations were in existence and no publicly held company owned 10% or more of Tri-State Clinical Laboratories, Inc.'s stock.

TABLE OF CONTENTS

	Page
Question Presented	i
List of Parties	ii
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	v
Table of Appendices	vii
Statement of the Case	1
Reasons for Denying the Writ	3
I. The Actual Amount Of A Criminal Penalty Imposed On A Bankruptcy Debtor In Possession Is Not An Administrative Expense Under The Bankruptcy Code And This Court Should Not Review The Third Circuit's Decision To The Contrary.	3
A. The Third Circuit Did Not Depart From This Court's Decision In *Reading Co. v. Brown* When It Decided That Criminal Penalties Assessed For Conduct Engaged In During A Chapter 11 Proceeding Are Not An Administrative Expense.	4

Contents

Page

B. The Court Of Appeals Did Not Misconstrue The Legislative History Of The Bankruptcy Code, And It Did Not Depart From The Themes Of *Reading*. 7

C. The Third Circuit's Decision Does Not Render 28 U.S.C. § 959(b) Inoperable. 9

D. The Third Circuit's Decision Is Not Contrary To This Court's Policy That Federal Bankruptcy Courts Should Not Invalidate State Criminal Proceedings. 10

E. The Third Circuit's Decision Does Not Stand Alone And In Conflict With The Authoritative Decisions Of All Other, Or Of Any Other, United States Courts Of Appeals That Have Addressed This Issue, Since No Other Courts Of Appeals Have Addressed This Specific Issue. 12

F. The Third Circuit's Decision Is Consistent With The Concise Wording Of § 503(b) Of The Bankruptcy Code, Which Limits Administrative Expenses. 16

Conclusion 18

TABLE OF CITED AUTHORITIES

Page

Cases:

Bates v. United States, 522 U.S. 23 (1997) 16

Cumberland Farms v. Florida Dep't of Envtl. Protection, 116 F.3d 16 (1st Cir. 1997) 13, 14

Grogan v. Garner, 498 U.S. 279 (1991) 16

In re Charles Bank Laundry, Inc., 755 F.2d 200 (1st Cir. 1985) 14

In re Mammoth Mart, Inc., 536 F.2d 950 (1st Cir. 1976) 14

In re N.P. Mining Co., 963 F.2d 1449 (11th Cir. 1992) 12, 13, 14

Kelly v. Robinson, 479 U.S. 40 (1986) 8

K-Mart Corp. v. Cartier, Inc., 486 U.S. 281 (1988) 16

Oregon v. Witcosky (In re Allen Care Centers, Inc.), 96 F.3d 1328 (9th Cir. 1996) 15, 16

Pennsylvania Department of Public Welfare v. Davenport, 495 U.S. 552 (1990) 8, 15

Reading Co. v. Brown, 391 U.S. 471 (1968) 4, 5, 6, 7, 12, 16

Cited Authorities

Page

United States Department of Interior v. Elliot, 761 F.2d 168 (4th Cir. 1985) 14

Statutes:

18 PA. STAT. ANN. § 307 11

11 U.S.C. § 101(11) 15

11 U.S.C. § 503 17

11 U.S.C. § 503(b) 10, 12, 16, 17

11 U.S.C. § 503(b)(3)(c) 17

11 U.S.C. § 507(a)(1) 2

11 U.S.C. § 523(a)(7) 8, 11, 17

11 U.S.C. § 726(a)(1) 2

11 U.S.C. § 726(a)(4) 2, 7, 8

28 U.S.C. § 959(b) 9

Other Authority:

Black's Law Dictionary 521 (6th ed. 1990) 17

TABLE OF APPENDICES

	Page
Appendix — Relevant Statute	1a

Respondent respectfully prays that a writ of certiorari not issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit which has held that the actual amount of a punitive criminal fine imposed upon a Debtor during the pendency of a Chapter 11 Petition was not an administrative expense of the Bankruptcy Estate.

STATEMENT OF THE CASE

On August 14, 1990, a voluntary petition pursuant to Chapter 11 of the United States Bankruptcy Code was filed by Tri-State Clinical Laboratories, Inc. (hereinafter, "Debtor"). On January 21, 1992, a criminal complaint (hereinafter, "Complaint") was filed against Debtor for alleged violations of Pennsylvania's Solid Waste Management Act (hereinafter, "Act"). Count I of the Complaint accused Debtor of allegedly unlawfully storing municipal waste on or about July 18, 1990. Count II of the Complaint alleged that Debtor violated the Act on October 4, 1990, by allegedly disposing of infectious waste in a municipal dumpster.

Debtor was ordered to pay a criminal fine in the amount of $10,000.00, as a result of the allegations in Count I. Debtor was also ordered to pay a criminal fine in the amount of $20,000.00, as a result of the allegations in Count II.

Joseph P. Nigro was appointed as the Chapter 11 Trustee in September, 1992. On Motion of Mr. Nigro, the case was converted to Chapter 7 on October 6, 1992, and Mr. Nigro was appointed the Chapter 7 Trustee on December 1, 1992.[1]

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1. From this point forward "Respondent" will be used to refer to Mr. Nigro acting solely in his capacity as Trustee of the Bankruptcy Estate of the Debtor.

On August 19, 1994, Petitioner filed a proof of claim in which it asserted: 1) a $10,000.00 subordinated unsecured claim pursuant to § 726(a)(4) of the United States Bankruptcy Code (hereinafter, "Code"), on the basis of the Count I criminal fine; and, 2) a $20,000.00 Administrative Claim pursuant to § 726(a)(1) and § 507(a)(1) of the Code, on the basis of the Count II criminal fine.

There have been no averments or allegations that the fines were assessed in relation to any actual costs or expenses incurred by Petitioner, or for any monies disbursed by Petitioner relating to the criminal acts, generally, or relating to the prosecution of the criminal acts, specifically. The fines were assessed solely as a punitive measure.

On April 1, 1997, Respondent filed the Trustee's Objection to Proof of Claim Filed by the Commonwealth of Pennsylvania, Department of Environmental Resources, and a Notice of Hearing With a Response Deadline, on April 1, 1997. Although Respondent's Objection did not address the claim based upon the Count I criminal fine, Respondent has objected to the Administrative characterization of the actual amount of the Count II criminal fine.

On April 9, 1997, a hearing was held before the Bankruptcy Court, at which point in time it was determined that the facts were not in dispute. On August 21, 1997, the Bankruptcy Court entered an order sustaining Respondent's objection, and held that Petitioner had a valid unsecured claim.

An appeal was timely filed by Petitioner to the United States District Court for the Western District of Pennsylvania. On May 5, 1998, the decision of the Bankruptcy Court was affirmed by the District Court.

A timely appeal was filed with the United States Court of Appeals for the Third Circuit, and on June 2, 1999, the Court of Appeals affirmed the decision of the District Court, which had affirmed the decision of the Bankruptcy Court. Petitioner's request for hearing *en banc* was denied on July 21, 1999.

REASONS FOR DENYING THE WRIT

I.

THE ACTUAL AMOUNT OF A CRIMINAL PENALTY IMPOSED ON A BANKRUPTCY DEBTOR IN POSSESSION IS NOT AN ADMINISTRATIVE EXPENSE UNDER THE BANKRUPTCY CODE AND THIS COURT SHOULD NOT REVIEW THE THIRD CIRCUIT'S DECISION TO THE CONTRARY.

Petitioner is correct when it states that the issue presented before this Honorable Court is "clear cut and straightforward." However, Petitioner is incorrect when it states that the Third Circuit's decision ignores "the text of the Bankruptcy Code and misconstru[es] legislative history to circumvent this Court's decision in *Reading Co. v. Brown*, 391 U.S. 471 (1968), [which] encourages other debtors in possession to engage in similar cost-benefit analysis when deciding if they should comply with state and federal laws." Pet. at 4.

On the contrary, in its decision, the Third Circuit has applied the plain text of the Code, and properly refused to create legislation by adopting a holding which would do what the United States Congress has chosen not to do, as of this date. Despite Petitioner's attempts to have the judicial branch

legislate in this case, the Third Circuit has honored the intent of Congress by properly interpreting the legislative history of the Bankruptcy Code while honoring the themes established by this Honorable Court in *Reading*. Additionally, Petitioner's argument that Chapter 11 debtors in possession (hereinafter, "DIPs") will now somehow be encouraged to commit criminal acts as cost-cutting measures is unrealistic and without merit. Furthermore, no other circuit courts have ruled on the specific issue of the prioritization of the actual amounts of punitive criminal fines incurred by a DIP, and as such, the Third Circuit's decision does not conflict with any other courts in this land. This case's holding stands alone because the facts of this case clearly make this case unique. Therefore, no compelling reasons exist for this Petition to be granted by this Honorable Court.

A. The Third Circuit Did Not Depart From This Court's Decision In *Reading Co. v. Brown* When It Decided That Criminal Penalties Assessed For Conduct Engaged In During A Chapter 11 Proceeding Are Not An Administrative Expense.

Contrary to Petitioner's analysis of the Third Circuit's holding in this case, the Third Circuit's decision actually furthers the rationale espoused by this Honorable Court in *Reading*.

Whether this present case is contrasted with *Reading*, or compared to *Reading*, it is important to study the underlying claim of both subject creditors in each of the cases. In *Reading*, this Honorable Court was confronted with a claim filed by a Creditor whose house was destroyed by a fire which resulted from the negligence of the receiver of the Debtor's estate, and one of the receiver's workmen. The claim of the creditor was based upon a civil tort, through

which the creditor sought reimbursement of actual damages caused by the estate. The claim in *Reading* arose through a mere accidental act of a receiver. *Reading Co.*, 391 U.S. at 477. It was in this context that this Honorable Court stated that those creditors that suffer an actual injury by the operation of the business should recover ahead of other creditors. *Id.* at 482, 485.

Additionally, in *Reading*, this Honorable Court stated: "We hold that damages resulting from the negligence of a receiver acting within the scope of his authority as receiver give rise to 'actual and necessary costs' of a Chapter XI arrangement." *Id.* at 485. Thus, claims that should be deemed to be administrative expenses are those involving actual damages, and which result from activity of a receiver (or DIP, in this case) acting within the scope of its authority.

The Third Circuit's opinion in the present case is consistent with the aforementioned *Reading* analysis. In the present case, Debtor engaged in "egregious" criminal conduct, according to the Petition. Pet. at 3. The Proof of Claim filed by Petitioner is comprised solely of the actual amount of a punitive, criminal, fine assessed against the Debtor as a result of the Debtor's violation of criminal statutes. There are no facts of record which indicate that the $20,000.00 fine has been assessed as reimbursement for Petitioner's damages.[2]

In the present case, the Third Circuit stated:

> It is neither reasonable nor necessary for a commercial enterprise to violate criminal laws and

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2. In fact, Petitioner states in its statement of the case that the proof of claim was filed seeking to collect the $20,000.00 criminal "penalty" as a Chapter 11 administrative expense. Pet. at 3.

> endanger the public . . . Rather we believe Congress intended only for those "actual necessary costs and expenses" that arise in context of, or compensate for, legitimate business activity, or the losses resulting therefrom, to be treated as expenses of preserving the estate, and accorded priority as an administrative expense.

Petitioner's App. at 13a.

Finally, *Reading* stated that an important statutory objective in bankruptcy is: "fairness to all persons having claims against an insolvent." *Reading Co.*, 391 U.S. at 477. This Honorable Court placed such an emphasis on that specific objective, that it was held to be the "decisive" statutory objective. *Id.* In the present case, the Third Circuit followed *Reading*'s theme of fairness to all creditors when it stated that if Petitioner's claim is deemed to be an administrative expense:

> The practical result would be that fines for committing crimes would be paid by innocent creditors . . . rather than . . . the criminal. That is as unfair as it is impractical. The payment of the criminal fine would not compensate for any damages resulting from Tri-State's conduct. It would merely cause Tri-State to satisfy its obligations to the state out of the pockets of Tri-State's creditors.

Petitioner's App. at 13a.

The Third Circuit's opinion does follow the rationale behind *Reading*'s belief that those who suffered actual

injuries from the operation of a business should recover ahead of other creditors, and that fairness mandates that all innocent creditors should not have to pay the punitive fine incurred as a result of Debtor's criminal acts.

None of the cases cited by Petitioner, including *Reading*, are factually similar to this case. All cases cited by Petitioner involve civil fines, and none involve punitive criminal fines. Although the facts of this case make it truly unique, the Third Circuit applied the themes of *Reading* to this case in order to render a just decision.

B. The Court Of Appeals Did Not Misconstrue The Legislative History Of The Bankruptcy Code, And It Did Not Depart From The Themes Of *Reading*.

Seeking to have this Honorable Court do what only Congress may do, Petitioner has taken a portion of the Third Circuit's opinion out of context.

Although the Third Circuit does reference and discuss 11 U.S.C. § 726(a)(4) in its opinion, the Third Circuit does not rely upon the legislative history of § 726(a)(4) of the Code, exclusively when rendering its decision in this case. Petitioner's App. at 21a. The Third Circuit simply cites to the legislative history of this code section in the context of discussing the legislative history of the Code, in general. In addition to considering the legislative history of the Code, the Third Circuit stated that its decision was also based upon policy considerations evidenced by the text of the code and cases interpreting same. Petitioner's App. at 21a.[3]

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3. In fact, after discussing the legislative history of § 726(a)(4), the Third Circuit specifically stated, "Thus, prepetition fines were

(Cont'd)

By analyzing the legislative history of the entire Code, the Third Circuit concluded that there was a distinction between a portion of a criminal fine which was compensatory and a portion of which was non-compensatory. In its opinion, the Third Circuit determined this by analyzing § 523(a)(7) of the Code, and the cases of *Kelly v. Robinson*, 479 U.S. 40 (1986), and *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552 (1990), which interpreted same. Petitioner's App. at 20a-21a. It was only after this analysis that the Court determined that a distinction between the compensatory nature of a criminal fine, and the non-compensatory nature of such a fine, should be maintained throughout the Code:

> We do not believe that Congress intended for us to ignore the non-compensatory character of a criminal fine in deciding if it is an administrative expense under § 503, while explicitly requiring that consideration under § 523(7). Rather, for the reasons previously stated, we conclude that § 503's restriction to "expenses of preserving the estate" limits such expenses to those that constitute compensation for expenditures necessary to the operation of the Debtor-in-possession's business.

Petitioner's App. at 21a.

(Cont'd)

accorded second class status in the distribution scheme." Petitioner's App. at 18a. The Third Circuit never explicitly or implicitly stated that its reference to § 726(a)(4) was dispositive in this case, in any way. Petitioner's App. at 18a.

Although the Third Circuit does mention Code sections involving pre-petition penalties in its opinion, Petitioner is incorrect in stating that the Third Circuit relied upon those Code sections in its disposition of this case.

C. The Third Circuit's Decision Does Not Render 28 U.S.C. § 959(b) Inoperable.

Respondent agrees that a DIP is required to manage and operate property in its possession according to the requirements of the valid laws of the state in which such property is located, according to 28 U.S.C. § 959(b).

However, in claiming that the Third Circuit's opinion renders § 959(b) inoperable, Petitioner's reasoning is flawed when it states:

> Any deterrent effect, however, is lost if a Debtor operating postpetition is allowed to do so with impunity, knowing that any penalty is characterized as a general unsecured claim and, therefore, in all probability will never be paid. Treating the criminal penalty as an administrative expense insures its payment, thereby reinforcing the deterrent effect by not allowing a debtor in possession and creditors to benefit from engaging in cost-cutting criminal behavior.

Pet. at 9.

It was never held that Petitioner's claim is denied in its entirety. The Third Circuit affirmed the orders of the District Court and the Bankruptcy Court, which held that Petitioner's

claim is allowed as an unsecured claim.[4] Petitioner still has a valid unsecured claim against the bankruptcy estate in this case.

Petitioner would have this Honorable Court believe that if Petitioner receives payment on its claim from the bankruptcy estate, and possibly to the exclusion of other creditors, this would have a deterrent effect on possible criminal conduct of DIPs in the future. The opposite is true. The true way to punish someone is to focus on the source of payment of the fine, to the exclusion of the recipient of said payment.

This case, however, involves the Debtor's commission of a criminal act. Deeming the actual amount of a criminal fine to be an "administrative expense" will have no deterrent effect on a criminal actor. The Third Circuit's interpretation that § 503(b) creates an administrative expense for claims involving reimbursement of actual costs, and not for claims involving the actual amounts of punitive criminal fines, does not "emasculate" any federal statute requiring DIPs to operate a business in accordance with state law.

D. The Third Circuit's Decision Is Not Contrary To This Court's Policy That Federal Bankruptcy Courts Should Not Invalidate State Criminal Proceedings.

The Third Circuit held that Petitioner has an unsecured claim, not an administrative claim pursuant to § 503(b) of

4. The Order of Court issued by the Bankruptcy Court is reproduced in Petitioner's App. at 42a; the Order of Court issued by the District Court is reproduced in Petitioner's App. at 29a; and, the Judgment issued by the Third Circuit is reproduced in Petitioner's App. at 25a.

the Bankruptcy Code. The Third Circuit neither denied Petitioner's claim, nor did it ever deem that Petitioner's claim is dischargeable. If it had, it would indeed have had the effect of invalidating the state criminal proceedings in this case, as Petitioner claims is the result of the decision below. Just because Petitioner's claim is not treated preferentially, as compared to other claimants, that does not mean that the Third Circuit invalidated (either actually or theoretically), Petitioner's criminal complaint.

Instead, if Petitioner had objected to the dischargeability of the debt underlying its claim, Petitioner's claim would have survived dischargeability, pursuant to § 523(a)(7) of the Code. Additionally, and ironically, Petitioner has the ability to pursue the officers of Debtor in this case pursuant to a valid state law. 18 PA. STAT. ANN. § 307.[5] As a result of the Third Circuit's decision, Petitioner could still choose to pursue the officers of Debtor, personally ultimately place the officers of the corporation in a position where they would be forced to use whatever means necessary to pay the fines, including selling their personal assets which are not even part of the bankruptcy estate (since the Debtor is solely the corporation). Just because Petitioner has failed to avail itself of this potential remedy does not mean that it does not exist.

The Third Circuit's decision does not "invalidate" any state criminal proceeding. In fact, the Third Circuit's decision bolsters and reinforces the criminal proceedings involving Petitioner in state court.

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5. Subsection (e) of Section 307 of 18 PA. STAT. ANN., entitled "Liability of organizations and certain related persons" has been reproduced in the Appendix to this Response. Respondent's App. at 1a.

E. The Third Circuit's Decision Does Not Stand Alone And In Conflict With The Authoritative Decisions Of All Other, Or Of Any Other, United States Courts Of Appeals That Have Addressed This Issue, Since No Other Courts Of Appeals Have Addressed This Specific Issue.

The Third Circuit was the first Circuit Court to address the specific issue stated in the Question Presented portion of this Reply. Thus, if the Third Circuit Court's holding "stands alone", it is alone not due to a conflict with other Circuit Courts, but due to the unique facts of this case.

In the Petition, Petitioner seeks to "boot-strap" the claim in the present case which involves the actual amount of a punitive criminal fine assessed for "egregious criminal conduct", into administrative expense priority pursuant to § 503(b). Petitioner attempts to do this by citing to other circuits which have dealt with facts and issues not the same as the facts and issue before this Honorable Court in the present case.

Petitioner cites to *In re N.P. Mining Co.*, 963 F.2d 1449 (11th Cir. 1992), which involved a civil fine imposed for the violation of a strip-mining regulation. Pet. at 11. The *N.P. Mining* court did not comment on punitive criminal fines assessed for egregious criminal conduct of DIPs. *N.P. Mining* chose to distinguish itself from *Reading*, a case relied upon by Petitioner, since *Reading* involved reimbursement of actual damages to the creditor. *N.P. Mining*, 963 F.2d at 1456.

Although adopting *Reading*'s view that in some cases "costs ordinarily incident to operation of a business" are to be accorded administrative-expense priority, *N.P. Mining* felt

that ensuring compliance by trustees with state law is sufficient justification to place civil penalties in the category of "some cases" where costs ordinarily incident to the operation of a business are deemed to be administrative expenses. *Id.* at 1458.

However, if a DIP (through its corporate officers) is clearly intent on engaging in criminal activity in violation of a criminal statute, at the possible risk of losing the officer's liberty or personal assets to a state enforcement agency, then merely deeming a criminal fine to be an administrative expense of a bankruptcy estate is definitely not going to encourage the DIPs to comply with state laws. The Third Circuit correctly recognized that the facts of the present case could not possibly allow for the *N.P. Mining* rationale to be dispositive in this case without the Third Circuit first inferring that criminal conduct is part of the ordinary and necessary operation of a business:

> . . . doing so [applying N.P. Mining's rationale here] would require us to infer that disposing of infectious human waste in a manner that not only endangers members of the general public, but also constitutes criminal activity, is part of the ordinary and necessary operations of a business.

Petitioner's App. at 23a. Fortunately, the Third Circuit chose not to insult the integrity of all business owners.

In its second attempt to illustrate a conflict where none exists, Petitioner cites to *Cumberland Farms v. Florida Dep't of Envtl. Protection*, 116 F.3d 16 (1st Cir. 1997). *Cumberland Farms* involved a civil fine imposed upon a DIP, Cumberland Farms, for its failure to "establish and maintain evidence of

financial responsibility." *Cumberland Farms*, 116 F.3d at 18. Since *Cumberland Farms* involves the imposition of a civil fine, its holding does not mandate a different decision in the present case, for the same aforementioned reasons that *N.P. Mining* does not mandate a different decision in this case.[6]

Another case cited by Petitioner is *United States Department of Interior v. Elliot*, 761 F.2d 168 (4th Cir. 1985). Although the *Elliot* court did hold that post-petition penalties should be treated on an equal basis, the rational applied by the *Elliot* court is inapplicable in the present case. Petitioner cites to *Elliot* for the proposition that Section 57(j) of the bankruptcy act allowed "all postpetition penalty claims regardless of whether they were incurred by the Trustee or by the Debtor in possession." Pet. at 14. However, the last part of that quote is the heart of the *Elliot* court's rationale: ". . . the critical inquiry is the extent to which the creditors could prevent the accrual of the penalties." *Elliot*, 761 F.2d at 172. What *Elliot* sought to establish by its holding was the allocation of responsibility to creditors of the bankruptcy estate. However, there has been no finding in this present case as to what the creditors of the Debtor's estate could

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6. Petitioner discusses other First Circuit cases referenced in *Cumberland Farms*, which involve civil fines. None of those cases are relevant to the present case for the same reason that *Cumberland Farms* is not: *In re Charles Bank Laundry, Inc.*, 755 F.2d 200 (1st Cir. 1985) (holding that a civil compensatory fine qualified for first-priority treatment, when the DIP was fined for violating an injunction); and, *In re Mammoth Mart, Inc.*, 536 F.2d 950 (1st Cir. 1976) (holding that claims entitled to first priority as cost or expense of administration, must first pass through threshold of occurring after filing of the Petition for relief, otherwise claim will not be considered for administrative expense prioritization).

have possible done to prevent Debtor's commission of the criminal acts which prompted the fine. It is also difficult to imagine that, in any bankruptcy case, any of the creditors could possibly be expected to know that a DIP is engaging in criminal activity.

Petitioner's reliance upon the case of *Pennsylvania Dep't of Pub. Welfare vs. Davenport*, 495 U.S. 552 (1990) for the proposition that there is generally no difference between the treatment of criminal and civil sanctions in the Bankruptcy Code is misplaced. Pet. at 14. The issue in *Davenport* was whether or not restitution obligations constitute "debts" within the meaning of § 101(11), and would be therefore dischargeable under Chapter 13. *Davenport*, 495 U.S. at 552. The issue before this Honorable Court in *Davenport* did not involve the treatment of criminal fines as compared to the treatment of civil fines in terms of Bankruptcy Code.

Finally, Petitioner misapplies the case of *Oregon v. Witcosky (In re Allen Care Centers, Inc.)*, 96 F.3d 1328 (9th Cir. 1996) in its final attempt to show that the Third Circuit's decision conflicts with other circuit courts. Petitioner alleges that the court in *Witcosky* denied administrative expense status to the subject creditor's claim (based upon recoupment of funds advanced by a state agency to the Debtor) because the "expenses were not a result of the debtors wrongdoing, but simply from its insolvency." Pet. at 14. Petitioner also states that "in the Ninth Circuit, a state only receives administrative expense priority if the Debtor engages in wrongdoing." Pet. at 14-15. What Petitioner fails to state is that the Court in *Witcosky* was explaining why it did not agree with the Oregon Department of Human Resources' assertion that its expenses "were entitled to administrative priority under *Reading* as 'costs ordinarily

incident to operation of a business.' " *Witcosky*, 96 F.3d at 1331. Ironically, the Ninth Circuit's holding and rationale actually narrow the application of *Reading* to prevent "boot-strapping" efforts (such as the one attempted by Petitioner in this case) when it stated, "the rule of Reading applies only in cases involving 'post-petition tort-like conduct.' " *Id.*

The Third Circuit is the first Circuit Court of Appeals to encounter the issue of how to treat creditor claims based upon the actual amount of purely punitive post-petition criminal fines incurred during the pendency of a Chapter 11 bankruptcy. The Third Circuit's analysis is consistent with the analysis undertaken by all of the cases cited by Petitioner, but since the subject matter of this case is different from all others, there is no conflict between the circuits.

F. The Third Circuit's Decision Is Consistent With The Concise Wording Of § 503(b) Of The Bankruptcy Code, Which Limits Administrative Expenses.

The United States Bankruptcy Code is clear and unambiguous, and the Third Circuit's decision is consistent with the Code.

This Honorable Court has held that whenever a court analyzes the meaning of a particular statute, it must look to the particular statutory language at issue, as well as the language and design of the statute as a whole. *Grogan v. Garner*, 498 U.S. 279, 287 (1991) (*citing K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988)). Additionally, this Honorable Court generally resists reading words or elements into a statute that do not appear on its face. *Bates v. United States*, 522 U.S. 23 (1997). It is against this backdrop that the Third Circuit decided the present case.

Section 503(b) of the Code explicitly addresses the actual amount of criminal fines, but only allows administrative expense priority for the actual amount of criminal fines in the context of taxes. Section 503(b) also explicitly addresses administrative claims relating to criminal prosecutions, but limits such claims to the "actual, necessary *expenses*" incurred by a creditor "in connection with the prosecution of a criminal offense relating to the case or to the business or property of the Debtor." 11 U.S.C. § 503(b)(3)(c) (Emphasis added; text reprinted in Petitioner's App. at 44a-45a).[7]

Further references to criminal fines in the Code are found in § 523(a)(7), which explicitly references the actual amounts of fines and penalties by exempting same from dischargeability debts "to the extent such debt is for a fine, penalty . . . payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty . . ." 11 U.S.C. § 523(a)(7).

In its analysis of the Code, the Third Circuit found the language of § 503(b) to be suggestive of a quid pro quo exchange in which the estate accrues a debt for consideration necessary to the operation of the business. Petitioner's App. at 7a. In its well reasoned opinion, the Third Circuit stated: "Congress recognized the need to provide incentive to creditors who would otherwise not continue to provide

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7. The Third Circuit does state that since Congress expressly included tax fines and penalties in § 503, this implies that had Congress intended to include other types of fines and penalties within the class of administrative expenses, it would have done so expressly. Petitioner's App. at 7a n.4. This follows the maxim "*expressio unius est exclusion alterius*", meaning the expression of one thing is the exclusion of another. Black's Law Dictionary 521 (6th ed. 1990).

services to a failing business. Accordingly, 'the actual, necessary costs and expenses of preserving the estate' are given priority under the Code." Petitioner's App. at 8a.

It was, in part, after this analysis of the actual language of Bankruptcy Code, itself, that the Third Circuit properly held that punitive criminal fines arising from post-petition behavior are not administrative expenses. Petitioner's App. at 23a.

There is no need for this Honorable Court to intervene since Petitioner has failed to provide any compelling reasons for this Honorable Court to grant its Petition.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX — RELEVANT STATUTE

18 Pa. C.S.A. § 307(e)

§ 307. Liability of organizations and certain related persons

* * *

(e) Persons acting or under a duty to act for organizations. —

(1) A person is legally accountable for any conduct he performs or causes to be performed in the name of a corporation or an unincorporated association or in its behalf to the same extent as if it were performed in his own name or behalf.

(2) Whenever a duty to act is imposed by law upon a corporation or an unincorporated association, any agent of the corporation or association having primary responsibility for the discharge of the duty is legally accountable for a reckless omission to perform the required act to the same extent as if the duty were imposed by law directly upon himself.

(3) When a person is convicted of an offense by reason of his legal accountability for the conduct of a corporation or an unincorporated association, he is subject to the sentence authorized by law when a natural person is convicted of an offense of the grade and the degree involved.

* * * *